May 25, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ronnie J. Simon

Date of Filing: March 17, 2006

Case Number: TFA-0154

On March 17, 2006, Ronnie J. Simon (Simon) filed an appeal from a determination issued to him on February 10, 2006, by the Department of Energy's (DOE) Golden Field Office (GO). In that determination, GO responded to a request for documents that Simon submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. GO identified several documents responsive to Simon's request. Some of those documents were released in their entirety and, pursuant to Exemptions 4 and 6 of the FOIA, others were released with some deletions or withheld in their entirety. Simon challenged the withholding of information and the amount of the fees he was charged in connection with the processing of his FOIA request. This appeal, if granted, would require GO to release the withheld information to Simon and reconsider the fees charged.

I. Background

Simon requested copies of all Cooperative Agreements awarded in connection with the DOE's "Controlled Hydrogen Fleet and Infrastructure Demonstration and Validation Project." See Letter from GO to Simon (February 10, 2006) (Determination Letter). According to GO, the DOE awarded a Cooperative Agreement to each of the following applicants: Chevron Texaco Technology Ventures, L.L.C.; General Motors Corporation; Ford Motor Company; and Daimler-Chrysler Corporation (hereinafter "the four award recipients"). *Id.* GO identified several documents responsive to Simon's request and requested comments from the four award recipients regarding whether the information should be released. The four award recipients requested that certain information not be released to the public because disclosure of the information could result in substantial harm to the competitive positions of the companies. On February 10, 2006, GO issued a determination in response to Simon's request. Of the responsive documents GO identified, 401 pages were released in their entirety, 91 pages were partially withheld pursuant to Exemptions 4 and 6, and 950 pages were withheld in their entirety pursuant to Exemptions 4 and 6. Determination Letter at 3. GO stated that the information withheld under Exemption 6 consisted of "individual names listed in the documents who are not key

personnel." Determination Letter at 2. GO added that the documents withheld under Exemption 4 contained "information considered to be commercial or financial information obtained from a person and privileged or confidential." *Id*. According to GO,

> The information includes data which reveals a company's labor costs, company assets, liabilities and net worth; a company's actual costs; break-even calculations; profits and profit rates; workforce data which reveals labor costs; fringe benefits; direct and indirect costs; profit margins; competitive vulnerability; selling prices; purchase activity; freight charges; purchase records; prices paid for advertising; names of consultants and subcontractors; routing systems; cost of raw materials; and pricing strategy.

Id. GO reasoned that the information was properly withheld because release of the information could result in substantial competitive harm to the submitters of the information. *Id*.

Simon filed the present appeal on March 17, 2006. Letter from Simon to OHA (March 5, 2006) (Appeal Letter).[1] In his appeal, Simon argues that GO's withholding of information pursuant to Exemption 4 was inappropriate because the withheld information was contained in cooperative agreements awarded rather than technical and business applications. Simon further argues that "if DOE and other agencies can claim that non-classified [c]ooperative [a]greements (and all other contracts with private companies), contain confidential information, then the public has no ability to know how public funds are being spent." Appeal Letter. Finally, Simon appeals the amount of fees charged for processing his request.[2]

II. Analysis

Exemption 4

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary

[1] Simon's initial submission of his appeal was deficient under DOE's FOIA regulations in that it did not contain a copy of the Determination Letter. See 10 C.F.R. 1004.8(b). On March 27, 2006, Simon completed the filing of the appeal by submitting a copy of the Determination Letter.

[2] Because Simon did not challenge the GO's withholding of information under Exemption 6, we will not address that matter in this decision and order.

information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

In this case, the four recipients of the Cooperative Agreements were required to submit the documents in question as part of the agency's solicitation process. Accordingly, we find that the withheld information was "involuntarily submitted" and, in order for the application of Exemption 4 to be proper, the *National Parks* test must be met.

Under *National Parks*, the first requirement is that the withheld information be "commercial or financial."[3] The information submitted by the four recipients of the cooperative agreements, i.e. labor costs, profit margins, company assets and liabilities, pricing strategies, etc., clearly satisfies the definition of commercial or financial information.

The second requirement under the National Parks test is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp*., 28 DOE ¶ 80,105 (2000). Each of the four recipients in this case satisfies that definition.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be "confidential." Withheld information is confidential if its release would either (a) impair the government's ability to obtain such information in the future or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. In this case, because the solicitation process for the project required that the information be submitted, it is unlikely that release of the information would impair DOE's ability to obtain similar information in the future.[4] The question, then, turns to whether release of the information could result in substantial competitive harm to the submitters of the information. According to GO,

> Because the intent of the program is to validate hydrogen technologies that will lead to commercially marketable hydrogen fuel cell vehicles (and their related infrastructure), there is intense confidentiality associated with actual product development data, budgets, and costs. The automotive companies and their infrastructure demonstration partners have invested literally millions of dollars of their own funds into the development of hydrogen fuel cell vehicles and infrastructure, and are competing directly with each other to produce a commercially marketable product that will ultimately be available to the public.

[3] Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

[4] GO, however, argues that the recipients are "currently focused on the demonstration of 'Generation 1' hydrogen fuel cell vehicles. Their anticipated 'Generation 2' vehicles, also to be demonstrated under this award, will be even more technically advanced and commercially sensitive. If DOE divulges confidential business and financial information under FOIA with respect to the Generation 1 demonstration vehicles, there can be no doubt it will impair the agency's ability to obtain such information in the future – under this or future awards." Letter from Kimberly Graber, GO, to Diane DeMoura, OHA (April 28, 2006).

Letter from Kimberly Graber, GO, to Diane DeMoura, OHA (April 28, 2006). Given the competitive aspect of the project and the very specific nature of the commercial and financial information contained in the Cooperative Agreements, we agree with GO's assessment that the release of the information could result in substantial competitive harm to the submitters of the information.

We have also considered Simon's arguments on appeal and find them to be unpersuasive. First, Simon's attempt to draw a distinction between commercial and financial information in "technical and business applications" and the information in the Cooperative Agreements is without merit. Neither the FOIA nor the relevant case law looks to the type of document in which information is contained in determining the applicability of Exemption 4. The issue here is whether the information itself satisfies the requirements set forth in *National Parks*, not the nature of the document in which the information is presented.

Second, we find no merit in Simon's assertion that withholding commercial and financial information in non-classified documents impairs the public's ability to know how public funds are being spent. The intent of Exemption 4 is to facilitate the government's ability to obtain commercial and financial information it requires in meeting its objectives. Releasing confidential commercial and financial data could lessen any incentive for companies to continue to provide such information in the future. Furthermore, after reviewing a sample of the documents in question, we note that information in the awards of the Cooperative Agreements relating to the amount of money expended by DOE on the project was not withheld. Consequently, we fail to see how releasing the commercial and financial data of the recipients would shed any additional light on how public funds were spent.

Fees Incurred

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). The FOIA delineates three types of costs – "search costs," "duplication costs," and "review costs" – and outlines three categories of requesters, specifying the costs each category of requesters must pay. If a requester wants the information for a "commercial use," it must pay for all three types of costs incurred. In contrast, educational institutions and the news media are required to pay only duplication costs, and all other requesters are required to pay search and duplication costs, but not review costs. 5 U.S.C. § 552(a)(4)(A)(ii); 10 C.F.R. § 1004.9(b).

Simon did not specify the grounds on which he challenged the fees he was charged in connection with the processing of his FOIA request. GO has informed us that Simon was categorized as a "commercial use" requester because GO was aware that Simon was the president of a company who unsuccessfully sought to have his company involved in the solicitation process for the awarding of the Cooperative Agreements and "he has long made known his desire to have small businesses more actively engaged in DOE's efforts to demonstrate hydrogen fuel cell vehicles." Letter from Kimberly Graber to Diane DeMoura. The DOE regulations state that a "'[c]ommercial use' request refers to a request from . . . one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester." 10 C.F.R.

§ 1004.2(c). The regulations also state that "when the DOE receives a request for documents which appears to be for commercial use, charges will be assessed to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought." 10 C.F.R. § 1004.9(b)(1). We see no error in GO's categorization of Simon as a commercial use requester. Furthermore, having been informed by GO of the method of calculation and the actual amount of fees to be charged, "Simon agreed to the charges and submitted payment without challenging his requester status, categories of charges, or the calculation of fees." We see no reason to find that the amount of fees GO charged Simon was incorrect.

It Is Therefore Ordered That:

(1) The appeal filed by Ronnie J. Simon on March 17, 2006, Case No. TFA-0154, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 25, 2006